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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

GERRY TOLENTINO,

Plaintiff,

vs.

COLLECTION BUREAU OF
AMERICA, LTD,

Defendant.

CASE NO. '14CV1244 MMAJMA

COMPLAINT FOR DAMAGES

**VIOLATIONS OF THE
TELEPHONE CONSUMER
PROTECTION ACT,
47 U.S.C. 227, ET SEQ.**

JURY TRIAL DEMANDED

INTRODUCTION

1. Gerry Tolentino (“Plaintiff”) brings this action for damages and any other available legal or equitable remedies, resulting from the illegal actions of Collection Bureau of America, Ltd. (“Defendant”) and its present, former, or future direct and indirect parent companies, subsidiaries, affiliates, agents, and related entities, in negligently, or willfully violating the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*. Plaintiff alleges as follows upon personal knowledge as to himself and his own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by his attorney.

JURISDICTION AND VENUE

2. Jurisdiction is proper under 28 U.S.C. § 1331 because this action arises out of Defendant’s repeated violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”).
3. Venue is proper in the United States District Court for the Southern District of California pursuant to 28 U.S.C. § 1391(b)(c) and § 1441(a) because Defendant is deemed to reside in any judicial district in which they are subject to personal jurisdiction at the time the action is commenced and because Defendant’s contacts with this District are sufficient to subject it to personal jurisdiction. Venue is also proper in this District under 28 U.S.C. § 1391(b) because Defendant transacts business here and because Plaintiff has resided in this District at all times relevant to these claims such that a substantial part of the events giving rise to Plaintiff’s causes of action against Defendant occurred within this judicial district.

PARTIES

4. Plaintiff is, and at all times mentioned herein was, an individual citizen and resident of the State of California, County of San Diego, in this judicial district.

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1 5. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47
2 U.S.C. § 153(10).

3 6. Plaintiff is informed and believes, and thereon alleges, that Defendant is, and at
4 all times mentioned herein was, a corporation registered in California with its
5 principal place of business located in California. Plaintiff alleges that at all times
6 relevant herein Defendant conducted business in the State of California, in the
7 County of San Diego, within this judicial district.

8 7. Defendant is, and at all times mentioned herein was, a “person,” as defined by 47
9 U.S.C. § 153(32).

10 **FACTUAL ALLEGATIONS**

11 8. Plaintiff incurred a debt sometime prior to 2013. The debt was purchased,
12 assigned or transferred to Defendant for collection, or Defendant was employed
13 to collect the debt.

14 9. While attempting to collect the debt, Defendant called Plaintiff on his T-Mobile
15 cellular telephone ending 6211 no less than 12 (twelve) times from March 21,
16 2013 through May 20, 2013 and Plaintiff has a call log that lists the calls. The
17 telephone numbers Defendant usually used ended in 9299 and 9294.

18 10. Plaintiff believes Defendant called him on many other occasions and will seek to
19 obtain the applicable outbound dial list from Defendant in Discovery.

20 11. Defendant utilized an Automatic Telephone Dialing System as defined by 47
21 U.S.C. § 227 (a)(1) to place the calls to Plaintiff.

22 12. Defendant used an artificial or prerecorded voice to deliver messages to Plaintiff
23 without the prior express consent of Plaintiff in violation of 47 U.S.C. § 227
24 (b)(1)(A).

25 13. Plaintiff never gave Defendant consent to call his cellular telephone. Plaintiff
26 was assigned the number ending 6211 by T-Mobile about 2 (two) years ago and
27 the debt is much older than that, meaning Plaintiff did not list that number on the
28

1 credit application. Plaintiff does not know how Defendant obtained that number,
2 but it was not from Plaintiff.

3 14. Plaintiff acknowledges his number ending 6211 appears to be a land-line but it is
4 in fact assigned to his T-Mobile cellular telephone.

5 15. Plaintiff's wireless number ending 6211 may have been ported from a landline.
6 Under C.F.R. § 64.1200(a)(1)(iv)(C) there is a "safe harbor" for auto-dialed calls
7 to such a number for 15 (fifteen) days after porting. Here, the calls were made
8 well over 15 (fifteen) days after porting, if the number was in fact ported.

9 16. Defendant called Plaintiff on his cellular telephone ending 6211 at least 12
10 (twelve) times via an "automatic telephone dialing system" ("ATDS") as defined
11 by 47 U.S.C. § 227(a)(1) and by using "an artificial or prerecorded voice" as
12 prohibited by 47 U.S.C. § 227(b)(1)(A). This ATDS has the capacity to store or
13 produce telephone numbers to be called, using a random or sequential number
14 generator.

15 17. The telephone number Defendant or their agents called was assigned to a cellular
16 telephone ending 6211 for which Plaintiff incurs a charge for incoming calls as
17 set forth in 47 U.S.C. § 227(b)(1)(A)(iii).

18 18. These telephone calls constituted calls that were not for emergency purposes as
19 defined by 47 U.S.C. § 227(b)(1)(A)(i).

20 19. These telephone calls by Defendants or their agents violated 47 U.S.C. §
21 227(b)(1)(A)(iii).

22 20. Because the TCPA is a remedial statute, it should be construed to benefit
23 consumers. *Leshner v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993 (3d Cir.
24 2011)

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THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

47 U.S.C. § 227

21. In 1991, Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”),¹ in response to a growing number of consumer complaints regarding certain telemarketing practices.

22. The TCPA regulates, among other things, the use of automated telephone equipment or “autodialers.” Specifically, the plain language of section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party.²

23. According to findings by the Federal Communication Commission (“FCC”), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.³

24. On January 4, 2008, the FCC released a Declaratory Ruling wherein it confirmed that autodialed and prerecorded message calls to a wireless number by a creditor, or on behalf of a creditor, are permitted only if the calls are made with the “prior express consent”.⁴

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¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

² 47 U.S.C. § 227(b)(1)(A)(iii).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (“FCC Declaratory Ruling”), 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (2008).

FIRST CAUSE OF ACTION

NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT

47 U.S.C. § 227 ET SEQ.

25. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.
26. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*
27. As a result of Defendant's negligent violations of 47 U.S.C. § 227 *et seq.*, Plaintiff is entitled to an award of \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
28. Plaintiff is entitled to seek injunctive relief prohibiting such conduct in the future.
29. Plaintiff is also entitled to an award of attorney fees and costs.

SECOND CAUSE OF ACTION

**KNOWING OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT**

47 U.S.C. § 227 ET SEQ.

30. Plaintiff incorporates by reference the above paragraphs of this Complaint as though fully stated herein.
31. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*
32. As a result of Defendant's knowing or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiff is entitled to treble damages, as provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).
33. Plaintiff is entitled to seek injunctive relief prohibiting such conduct in the future.
34. Plaintiff is also entitled to an award of attorney fees and costs.

1 **PRAYER FOR RELIEF**

2 Wherefore, Plaintiff respectfully requests the Court grant Plaintiff the following
3 relief against Defendant:

4
5 **FIRST CAUSE OF ACTION**
6 **NEGLIGENT VIOLATIONS OF**
7 **THE TCPA, 47 U.S.C. § 227 *ET SEQ.***

- 8 35. As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff
9 seeks \$500.00 (five-hundred dollars) in statutory damages, for each and every
10 violation, pursuant to 47 U.S.C. § 227(b)(3)(B);
11 36. Injunctive relief prohibiting such conduct in the future pursuant to 47 U.S.C. §
12 227(b)(3)(A);
13 37. An award of attorneys' fees and costs to counsel for Plaintiff;
14 38. Any other relief the Court may deem just and proper.

15
16 **SECOND CAUSE OF ACTION**
17 **KNOWING OR WILLFUL VIOLATIONS**
18 **OF THE TCPA, 47 U.S.C. § 227 *ET SEQ.***

- 19 39. As a result of Defendant's willful or knowing violations of 47 U.S.C. §
20 227(b)(1), Plaintiff seeks treble damages, as provided by statute, up to \$1,500.00
21 (one-thousand-five-hundred dollars) for each and every violation, pursuant to 47
22 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C);
23 40. Injunctive relief prohibiting such conduct in the future pursuant to 47 U.S.C. §
24 227(b)(3)(A);
25 41. An award of attorneys' fees and costs to counsel for Plaintiff;
26 42. Any other relief the Court may deem just and proper.

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TRIAL BY JURY

Pursuant to the Seventh Amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury on all counts so triable.

Date: May 19, 2014

LAW OFFICE OF DANIEL G. SHAY

By: /s/ Daniel G. Shay, Esq.

Daniel G. Shay, Esq.

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San Diego, CA 92108

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Attorney for Plaintiff Gerry Tolentino

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

GERRY TOLENTINO

(b) County of Residence of First Listed Plaintiff San Diego, CA
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Law Office of Daniel G. Shay - 619-222-7429
409 Camino Del Rio South, Ste 101B
San Diego, CA 92108

DEFENDANTS

COLLECTION BUREAU OF AMERICA, LTD

County of Residence of First Listed Defendant Alameda, CA
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'14CV1244 MMAJMA**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question
(U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. Section 1331 - Federal Question

Brief description of cause:
TCPA lawsuit**VII. REQUESTED IN COMPLAINT:**

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE

05/19/2014

SIGNATURE OF ATTORNEY OF RECORD

/s/ Daniel G. Shay, Esq.

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____